Nos. 82-1331 and 82-1352
IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,
et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE; BRIEF AMICUS CURIAE OF THE FLORIDA PUBLIC SERVICE COMMISSION IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI OF THE LOUISIANA PUBLIC SERVICE COMMISSION, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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LOUISIANA
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On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the
District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Florida Public Service Commission (hereinafter "FPSC") respectfully moves for leave to file the attached brief amicus curiae in

support of the request of the Petitioners, Louisiana Public Service Commission (Case No. 82-1331) and National Association of Regulatory Commissioners, et al. (Case No. 82-1352) that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit. The consent of counsel for the Petitioners to the filing of a brief amicus curiae by the FPSC has been obtained. The consent of respondents Federal Communications Commission and the United States of America to the filing of a brief amicus curiae by the FPSC has also been obtained.

The interest of the FPSC in this matter results from a statutory obligation to ensure the provision of telephone service at reasonable rates

to the citizens of Florida (Chapter 364, Florida Statutes).

The effect of the decision of the United States Court of Appeals for the District of Columbia Circuit affirming the order of the Federal Communications Commission contested by Petitioners is to curtail the ability of the FPSC to secure quality telephone service at reasonable rates for the citizens of Florida.

Accordingly, the FPSC is uniquely qualified to represent the interests of Florida's telephone ratepayers and users who are not parties to this action but whose interests will be directly affected by the ultimate resolution of the issues presented herein.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE FLORIDA PUBLIC SERVICE COMMISSION

INTEREST OF THE FLORIDA PUBLIC SERVICE COMMISSION

The Florida Public Public Service Commission (hereinafter "FPSC") is an agency of the State of Florida empowered to regulate, inter alia, the

provision of telephone service in the state. (Chapter 364, Fla. Stat.). The specific statutory responsibility of the FPSC is to ensure that the rates for telephone service in Florida are "fair, just, reasonable and sufficient" and that the services rendered are "prompt, expeditious and efficient" (§364.03, Fla. Stat.).

In addition, the FPSC is charged with the responsibility of monitoring and investigating "interstate rates, fares, charges, classifications, or rules of practice in relation thereto ... within this state" and to "petition the Federal Communications Commission where the same are ... excessive or discriminatory or are levied or laid in violation of the Act of Congress entitled "The Communications Act of 1934" ...". (§364.27, Fla. Stat.).

The Federal Communications Commission (hereinafter FCC) decision in the Second Computer Inquiry[1] (also referred to hereinafter as "Computer II") which was affirmed by the United States Court of Appeals for the District of Columbia Circuit, Computer and Communications Industry Association v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), dramatically alters the structure of the telecommunications industry and the framework for regulating that industry.

Specifically, the FCC decision at issue purports to preempt the ability of the FPSC to fulfill its statutory

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[1]In the matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Docket No. 20828), 61 FCC 2d 103 (1976), 64 FCC 2d 771 (1977), 72 FCC 2d 358 (1979), 77 FCC 2d 384 (1980), 84 FCC 2d 50 (1980), 88 FCC 2d 512 (1981).

mandate to ensure the provision of high quality, reasonably priced telephone service in Florida. The decision expressly precludes the FPSC from requiring Florida telephone companies to make available basic end-to-end telephone service to customers in Florida.

Accordingly, FPSC is vitally interested in the disposition of the pending petitions which contend that FCC preemption of state regulatory authority in this case is inconsistent with the FCC's statutory authority and the clear intent of Congress.

SUMMARY OF ARGUMENT

The Communications Act of 1934, 47 U.S.C. § 151 et. seq. (hereinafter "the Communications Act" or "the Act") reserves regulatory authority for the

states over intrastate rates and practices in the provision of telephone service. The FCC decisions at issue unlawfully invade areas of intrastate ratemaking and local telephone operations, properly within the ambit of state regulatory authority under the Communications Act.

If allowed to stand, these holdings will effectively have rewritten the jurisdictional provisions of the Communications Act by allowing the FCC to capriciously occupy the entire field of communications regulation. Such a result is legally improper and in direct opposition to the clearly expressed Congressional intent to reserve significant authority for the states in regulating the communications field.

In addition to violating the

statutory ratemaking prerogatives expressly granted to the states by Congress, these actions forclose the lawful ability of state regulators to ensure the provision and maintenance of basic local telephone service to state citizens. This outcome violates the spirit of the Communications Act to retain state control over service aspects of local telephone operations. The equitable impact of this facet of the FCC decision at issue is equally unconscionable and contrary to the delicate federal-state balance embodied in the Communications Act.

ARGUMENT

I. THE FCC MAY NOT PREEMPT THE LAWFUL RATEMAKING AUTHORITY RESERVED FOR THE STATES UNDER THE COMMUNICATIONS ACT OF 1934.

Under the Communications Act the longstanding policy for regulating

telephone service in this country has been to acknowledge a significant role for both federal and state authorities.[2] The recognition of a need for meaningful state control in this area is a result of the essentially local nature of many aspects of telephone service, vis a vis, the relationship of local telephone subscribers to their local telephone company.

Despite the absence of any significant jurisdictional revisions to the Act since its passage in 1934, the ambit of state regulatory authority thereunder has been steadily erroded by

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[2] 47 U.S.C. §§ 152(b) 221(b) (1976); 78 Cong. Rec. 10314 (1934); Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 149, 51 S. Ct. 65, 69 (1930).

the liberal and creative interpretations ascribed to the Act by the FCC and upheld by the intermediate federal appellate courts.[3]

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[3] New York Telephone Co. v. F.C.C., 631 F. 2d 1059 (2d Cir. 1980) (State commission's attempt to force changes in separations procedures legitimates FCC preemption); California v. F.C.C., 567 F. 2d 84 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978) (joint FX/CSAA facilities "technically and practically difficult to separate" for purposes of assertion of Federal jurisdiction are within FCC purview); Puerto Rico Telephone Co., v. FCC, 553 F. 2d 594 (1st Cir. 1977) (FCC has jurisdiction to prescribe terms for interconnection of PBX equipment); Brookhaven Cable TV, Inc. v. Kelley, 573 F. 2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979) (FCC may preempt State price regulation of pay cable television programming under its broadcasting regulatory authority); and NARUC v. F.C.C., 525 F. 2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (FCC may preempt State regulation of noncommon carrier spectrum allocation).

The case presently under consideration represents a judicial and administrative interpretation of the Act far in excess of the bounds of reasonable liberality or creativity. In effect, the Second Computer Inquiry decisions and the District of Columbia Circuit's affirmance thereof constitute the enactment of new legislation by the administrative and judicial branches of the federal government. This function, however, is properly reserved for the Congress under the United States Constitution (Article 1, Section 1).

In furtherance of the well established principles of separation of powers, established in the U.S. Constitution and embodied in the relevant federal statutes enacted thereunder, this Honorable Court must strike down the unlawful attempt of the

FCC and the District of Columbia Circuit to effectively rewrite the Act in clear controvention of the expressed will of the Congress.

A failure in this regard will destroy the delicate Federal-State balance of authority which has served this nation well in the regulation of communications for almost fifty (50) years. Moreover, inaction by the Court in this case will be tantamount to endorsing of a federal agency's ability to take action beyond the unambiguous congressional mandate of its enabling statute. For obvious reasons, the Court should refuse to contenance either of these outcomes and issue the writ of certeriori sought by petitioners.

Rather than restate further legal authority at length in support of the

foregoing argument, amicus curiae FPSC hereby expressly adopts the caselaw and statutory authority heretofore cited in the filings made by petitioners and similarly situated amicus curiae in this proceeding. In all other respects, the FPSC expressly endorses and adopts the positions of petitioners in this proceedings as set forth in the briefs on file with the Court.

II. THE FCC MAY NOT EQUITABLY DEPRIVE LOCAL TELEPHONE RATEPAYERS OF THE OPTION TO OBTAIN BASIC END-TO-END LOCAL TELEPHONE SERVICE FROM THEIR LOCAL TELEPHONE COMPANY

In addition to the legal arguments articulated in the jurisdictional briefs of petitioners in this case, and supported in the foregoing discussion, there is a profound equitable consideration which supports the issuance of a writ of certiorari in this case.

Apart from the outright invasion of state ratemaking prerogatives effectively accomplished by the decisions below, the Computer II holdings foreclose the fundamental ability of state regulators to secure the option for local customers to look to their local telephone company for basic end-to-end telephone service.

If the Computer II holdings are not overturned by this Court, citizens in Florida and throughout this country will no longer be able to rely on their local telephone company for the provision and maintenance of basic telephone service. Instead, local customers will be forced into a harsh and unwanted environment of multiple supply and maintenance entities for each segment of basic telephone service. (i.e., transmission line,

telephone set, inside wire, etc.)

The resulting inability to hold any single entity responsible for providing telephone service and maintenance will be disastrous. In a state such as Florida, with a high proportion of elderly citizens on fixed incomes, the potential for customer abuse, dislocation and dissatisfaction is staggering. This concern is supported by a recent statewide poll conducted in Florida showing that 86% of the citizens desired an option to continue leasing a telephone set from the local telephone company as part of basic service.[4]

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[4]Florida Statewide Survey, April 1982, conducted by MGT of America, Inc. 2425 Torreya Drive, Tallahassee, Florida 32303

Notwithstanding this clearly expressed desire, Florida citizens will no longer be able to look to the local phone company for basic service if the Computer II preemption decision is allowed to stand.

Customers whose telephone service ceases to function will face a never-ending cycle of "buck passing" and "runarounds" between the various suppliers and maintainers of each segment of telephone service. Shared responsibility, in this event, will likely mean an absence of responsibility for ensuring that telephone service is provided and maintained.

Although, given a choice, most local customers may wish to retain the option to obtain end-to-end basic telephone service and maintenance from

their local telephone company, state regulators can no longer require that this option be made available under the preemption decisions presently before the Court.

The above expressed category of equitable concern is clearly local in nature. The Act recognizes this intimately local aspect of telephone service and reserves the appropriate regulatory authority to the states in this area. The Computer II decisions and the Appellate Court's affirmance thereof, obliterate the judicious Congressional intent to reserve appropriate regulatory power for the states in overseeing such matters of local concern in the provision and maintenance of telephone service.

In response, this Honorable Court must reverse the decisions and restore

the proper jurisdictional balance originally intended by Congress. Accordingly, the Court should issue the writ of certiorari requested by petitioners in this case, to review this issue of deep concern for every American citizen.

CONCLUSION

For the foregoing reasons, FPSC respectfully urges this Honorable Court to grant the petitions for a writ of certiorari.

Respectfully submitted,

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